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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-152
Telecommunications Act of 1996:	)	
	)	
Telemessaging,	)	
Electronic Publishing, and	)	
Alarm Monitoring Services	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: September 20, 1996

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SUMMARY

Although the requirement in Section 274(b) that a BOC's electronic publishing affiliate or joint venture be "operated independently" from the BOC is amplified by the nine subsections of Section 274(b), they do not define that term entirely. Following past practice under the Computer II structural separation rules, the "operated independently" requirement, as amplified by subsection (b)(5) of Section 274, should be read to prohibit not only the common ownership of property and facilities by a BOC and its electronic publishing affiliate, but also their joint use of property and facilities, including the collocation of the affiliate's equipment in the BOC's central offices. Similarly, Section 274(b)(5) should be interpreted to prohibit the sharing of administrative and other services by the BOC and its electronic publishing affiliate, in order to preclude evasion of the prohibition against common employees.

Some of the BOCs insist that intermediate transport services they provide to alarm monitoring companies consititute alarm monitoring services. Since alarm monitoring service, as defined in Section 275(e), however, is an end-to-end service including the provision of a device at the customer's premises that receives signals from sensoring or other devices and that calls a monitoring center with an alarm signal, only Ameritech was actually providing such services as of November 30, 1995 and is thereby "grandfathered" under Section 275(a)(2).

As to those services that meet the definition in Section 275(e), the Commission should give a broad construction to the phrase "engage in the provision of alarm monitoring services"

under Section 275(a)(1). Thus, the provision of sales agency and marketing functions, as well as the installation and maintenance of alarm devices, in connection with an alarm monitoring service that meets the Section 275(e) definition should also be considered "engag[ing] in the provision of" such a service. Such participation by a BOC in an alarm monitoring service generates the incentive to discriminate against other alarm monitoring services that the prohibition in Section 275(a)(1) was intended to eradicate and thus should be prohibited for five years.

Some of the BOCs maintain that because ILEC and BOC telemessaging is specifically addressed in Section 260 of the Act, interLATA BOC telemessaging services cannot also be subject to the separate affiliate provisions of Section 272. There is nothing in the Act to suggest, however, that one provision displaces the other. A telemessaging service is an interLATA one if any two or more components of the service, connected by a link also provided by the telemessaging service on a bundled basis, are in different LATAs. If a BOC provides the interLATA link separately and independently from its telemessaging service, however, the telemessaging service is not interLATA as long as the BOC's interLATA service satisfies the Section 271 conditions and is subject to the requirements of Section 272.

Finally, although the Computer III and ONA rules are inadequate, they should continue to be applied to BOC electronic publishing and telemessaging services to help prevent discrimination and cross-subsidization until final rules are promulgated in the Computer III Further Remand Proceedings.

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Telemessaging, Electronic Publishing, and Alarm Monitoring Services	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI) hereby replies to the initial comments filed in response to the Notice of Proposed Rulemaking (NPRM), FCC 96-310 (rel. July 18, 1996), initiating the above-captioned docket. In this proceeding, the Commission seeks to clarify and implement the non-accounting separate affiliate and nondiscrimination safeguards established in the Telecommunications Act of 1996 (1996 Act) relating to the Bell Operating Company (BOC) and incumbent local exchange carrier (ILEC) provision of electronic publishing, alarm monitoring and telemessaging services.

As in the related proceedings implementing other non-accounting safeguards in the 1996 Act, such as the BOC In-Region proceeding,[1] the BOCs' and other ILECs' assurances that no implementing regulations are necessary with respect to Sections

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[1] Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, FCC 96-308 (rel. July 18, 1996).

260, 274 and 275 of the Communications Act are belied by their crabbed, unrealistic interpretations of those provisions. So as not to invite BOC and other ILEC resistance to the safeguards authorized by those provisions of the Act, the Commission should take this opportunity to interpret and implement those safeguards in a way that protects competition and ratepayers.

I. ELECTRONIC PUBLISHING (NPRM ¶¶ 35-42, 64-66)

One area of contention with regard to BOC provision of electronic publishing services concerns the degree of separation required between the BOCs and their electronic publishing affiliates and joint ventures. The BOCs argue that the requirement in Section 274(b) that a BOC's electronic publishing affiliate or joint venture "be operated independently" from the BOC is merely "`summary language,'" as U S West puts it,[2] and that the nine subsections of Section 274(b) constitute the only indicia of the "operated independently" requirement. They claim that to interpret Section 274(b) as containing any requirements not specifically listed in its subsections would be contrary to the statutory intent. Thus, for example, they assert that the prohibition in Section 274(b)(5) against common employees and joint ownership of property by a BOC and its separate electronic publishing affiliate does not prevent a BOC and such an affiliate from sharing the use of property and equipment and sharing

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[2] U S West Comments at 5 n.11.

administrative services.[3]

Although, as MCI stated in its BOC In-Region comments, the subsections of Section 274(b) amplify the "operated independently" requirement,[4] they do not define it entirely. Under the structure of that provision, its subsections are all subsumed within the "operated independently" requirement, and that requirement carries with it all of the criteria set forth in those subsections wherever it is used in related portions of the Act.[5] That requirement is not limited to those specific indicia, however. If it were, there would have been no need for the "operated independently" statement itself; Section 274(b) would simply have listed the nine subsections. That provision should not be interpreted to render its main point -- the statement that a BOC's electronic publishing affiliate or joint venture be "operated independently" from the BOC -- superfluous "'summary language.'"[6] Moreover, Section 274(b) does not state that the

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[3] See, e.g., Nynex Comments at 10-18.

[4] Comments of MCI Telecommunications Corporation at 26, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149 (filed Aug. 15, 1996)(MCI BOC In-Region Comments).

[5] Id. (citing Comm'r of Internal Revenue v. Lundy, 116 S.Ct. 647, 655 (1996)(identical terms in related parts of the same act should be interpreted to have the same meaning)).

[6] 2A Sutherland, Statutory Construction § 46.06 (5th ed.)("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.")

"operated independently" requirement is entirely defined by its nine subsections. Thus, "operated independently" should be interpreted to have a core meaning over and above the subsections of Section 274(b).[7]

As MCI explained in its BOC In-Region Comments, the Computer II[8] structural separation requirements provide some assistance in rounding out the definition of "operated independently," since those requirements address the similar "relationship between the enhanced service subsidiary and the underlying [BOC]"[9] and overlap with the subsections of Section 274(b) to a great extent. The Computer II Order continued the Computer I[10] "maximum separation" policy of prohibiting the subsidiary "from using in

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[7] Some of the BOCs inadvertently lend support to this approach by arguing that the "operated independently" requirement should be defined in the same way with respect to both electronic publishing affiliates and joint ventures. See, e.g., SBC Comments at 5-6. Defining "operated independently" in a uniform fashion with respect to both situations suggests that it has a core meaning apart from the subsections of Section 274(b), which vary in their application to separate affiliates and joint ventures.

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)(Computer II Order), mod. on reconsideration, 84 FCC 2d 50 (1981), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[9] Computer II Order, 77 FCC 2d at 477, discussed at pages 23-24 of MCI's BOC In-Region Comments.

[10] Regulatory and Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities, 28 FCC 2d 267 (1971), aff'd in part sub nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).

common any leased or owned physical space or property with an affiliated carrier on which is located transmission equipment or facilities used in the provision of basic transmission services," in order to prevent discriminatory access to basic transmission facilities and cost misallocation.[11] Computer II also prohibited the joint use or ownership of computer facilities.[12]

Accordingly, in light of the Computer II background, the "operated independently" requirement, as amplified by subsection (b)(5) of Section 274, should be read to prohibit the joint use of property or facilities, whether leased from a third party or otherwise, by the BOC and its electronic publishing affiliate, not just their joint ownership of property or facilities. Otherwise, the physical separation that is a prerequisite for independent operation will be undermined. Joint use of property or facilities will bring with it all of the need for cost allocations and the possibilities for discrimination that separate ownership is intended to prevent.

It is especially important, as Time Warner points out, that the electronic publishing affiliate not be permitted to collocate its equipment with the BOC's local exchange and exchange access equipment or share computer facilities.[13] Such sharing of BOC central office space and facilities, while competitors are

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[11] Computer II Order, 77 FCC 2d at 477-78.

[12] Id. at 478-79.

[13] See Time Warner Comments at 13.

relegated to other modes of access, is precisely the type of discriminatory favoritism that the independent operation requirement should be construed to prohibit.

Similarly, the requirement in Section 274(b)(5) that the BOC and its electronic publishing affiliate have no officers, directors and employees in common must not be evaded through the subterfuge of sharing in-house administrative functions, either by having one entity perform such functions for the other or by having another affiliate -- or the parent, as some BOCs suggest[14] -- perform them for both the BOC and its electronic publishing affiliate. As MCI explained in its BOC In-Region Comments, the prohibition of common employees would be undermined if a BOC were allowed to provide services for the affiliate, on a reimbursable basis, that would otherwise have been performed by the affiliate's own employees. In that situation, the affiliate and the BOC technically would not have any employees in common, but the affiliate might not have any employees. Since the language of Section 274(b)(5) is unqualified, there should be no exceptions for any in-house functions.[15] Moreover, such shared

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[14] See, e.g., Nynex Comments at 12.

[15] See MCI BOC In-Region Comments at 27-28. The requirement of separate employees would not necessarily be undermined in the same way if the BOC and its affiliate were to share outside services that are typically outsourced, such as insurance. In order to ensure that an outsourcing exception is not abused, it should apply only to those services and functions that the BOC outsourced prior to the date of passage of the 1996 Act. Any services that were performed formerly by the BOC in-house must also be performed in-house by the affiliate's own

services would also undermine the "operated independently" requirement.[16]

Some of the BOCs suggest that the Computer III[17] and related comparably efficient interconnection/open network architecture (CEI/ONA) requirements should not continue to be applied to BOC provision of electronic publishing services.[18] There is no indication, however, that Congress intended to do away with those regulations for this or any other segment of information services. Since the 1996 Act "shall not be construed to modify, impair or supersede Federal ... law unless expressly so provided in such Act or amendments,"[19] Congress "did not intend by implication to repeal [the Commission's] authority to impose ... regulatory treatment as [the Commission] deem[s] necessary to protect the public interest...."[20]

Moreover, there is no indication that there is any less need

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employees. Id. at 28.

[16] See AT&T Comments at 17.

[17] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958, 1039-42 (1986)(Computer III Order), on reconsideration, 2 FCC Rcd 3035 (1987); Phase II, 2 FCC Rcd 3072 (1987) (collectively, Computer III Orders), vacated and remanded sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[18] See, e.g., Nynex Comments at 23-24.

[19] Section 601(c)(1) of the 1996 Act.

[20] Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services at ¶ 29, CC Docket No. 96-21, FCC 96-288 (released July 1, 1996).

for those regulations now. As MCI explained in its BOC In-Region Comments, those rules, particularly ONA, are woefully inadequate, but they provide at least some supplemental protection against discrimination and cross-subsidies and should be retained until final rules are promulgated in the pending Computer III Further Remand Proceedings,[21] which rules should then be applied to BOC information services, including electronic publishing.

Of course, where some other requirement in Section 274 imposes a higher standard than the Computer III and CEI/ONA rules, the higher statutory standard should prevail. For example, CEI permits a BOC to collocate its competitive service equipment in its central offices, while competitors are relegated to "comparably efficient" interconnection, not requiring physical collocation. Since Section 274(b)(5), properly construed, prohibits such collocation of the electronic publishing affiliate's equipment in the BOC's central offices, the CEI requirements, to that extent, are supeseded by the requirements of Section 274.

II. ALARM MONITORING SERVICES (NPRM at ¶¶ 70-74)

The primary disputes related to Section 275 concern the definition of alarm monitoring service under Section 275(e) and what activities should be considered "engag[ing] in the provision

[21] Notice of Proposed Rulemaking, 10 FCC Rcd. 8360 (1995), discussed at pages 18-20 of MCI's BOC In-Region Comments.

of alarm monitoring services" under Section 275(a)(1). The stakes in those disputes are high, since they determine which activities are barred to the BOCs for five years under Section 275(a)(1) and which services are exempted from that prohibition under the "grandfathering" provision in Section 275(a)(2).

The Section 275(e) definitional issue focuses on certain transmission services, provided by the BOCs to alarm monitoring services, which transport an alarm signal from the end user's premises to the alarm service's monitoring center. As Ameritech and the Alarm Industry Communications Committee (AICC) point out, that is only one of the elements of alarm monitoring as defined in Section 275(e). An alarm monitoring service is an end-to-end service involving the provision of a device at the customer's premises that receives signals from sensoring or other devices and that calls a monitoring center with an alarm signal.[22]

US West describes two of its transmission services in a way that suggests that they include most of the elements of an alarm monitoring service, since it mentions "[a] remote module ... located on the alarm monitoring company patron's premises," which "sends alarm sensor status data ... to US WEST's scanner,"[23] but it fails to point out that the remote module and sensor devices at the customer's premises are installed by another entity -- the

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[22] AICC Comments at 11-16; Ameritech Comments at 24-27. See Section 275(e).

[23] U S West Comments at 30.

alarm monitoring service. Moreover, even U S West's description concedes that the U S West services hand off the data to an alarm monitoring company for interpretation. Thus, as AICC points out, U S West, and most of the BOCs, are simply providing an intermediate transport service between customer premise devices provided by an alarm monitoring service at one end and the alarm service's monitoring equipment at the other end. Ameritech's SecurityLink service is therefore the only BOC alarm monitoring service that qualifies for "grandfathering" under Section 275(a)(2).[24]

As to those services that qualify as alarm monitoring services under Section 275(e), a similar issue concerns the range of related activities that can constitute "engag[ing] in the provision of" such services. In particular, the BOCs argue that performing sales agency, marketing, or billing and collection functions for an alarm monitoring service, as well as the installation and maintenance of alarm devices, do not constitute the provision of alarm monitoring services. As AICC explains, however, the purposes of the prohibition in Section 275(a)(1) would be eviscerated if a BOC could participate in an alarm monitoring service in a manner that provided an incentive to favor that service over others, as would be the case with, for

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[24] AICC Comments at 13-16.

example, sales agency relationships.[25]

As an example of situations that can give rise to such incentives, AICC points to Southwestern Bell's proposed "Security Service," under which Southwestern will be involved in some way with every aspect of alarm monitoring as a marketing and billing agent and customer contact, except for the central station function, which it will subcontract out to a selected provider. As AICC points out, this proposal, combined with Southwestern Bell's control over the local services on which other alarm monitoring services depend, highlight the anticompetitive incentives that the prohibition in Section 275(a)(1) was intended to eradicate. Accordingly, sales, marketing and other activities that might provide a BOC an incentive to favor one alarm monitoring company over others must be considered to constitute the provision of alarm monitoring services under Section 275 and thus barred to the BOCs, other than Ameritech, for five years.

III. TELEMESSAGING SERVICE (NPRM at ¶¶ 75-77)

Some of the BOCs, particularly BellSouth, maintain that because telemessaging is specifically addressed in Section 260 of the Act, interLATA telemessaging services cannot also be subject

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[25] AICC Comments at 16-20. Thus, performing billing and collection services for alarm monitoring companies might not create such anticompetitive incentives as long as such services are conducted in the same manner as they are for unrelated interexchange carriers and other service providers and on a nondiscriminatory basis for all alarm monitoring service companies.

to the separate affiliate provisions of Section 272 applicable to all BOC interLATA information services. As BellSouth concedes, however, telemessaging meets the statutory definition of an information service.[26] There is nothing in the structure or any other aspect of the 1996 Act to suggest that application of Section 260 necessarily displaces Section 272, if the latter is otherwise applicable. The nondiscrimination and other provisions of Section 260 apply to all BOC and other ILEC provision of inter- and intraLATA telemessaging services, while the separate affiliate requirements apply only to BOC interLATA information services. Since both provisions can be given effect, and one does not render the other superfluous, Section 272 should apply to all BOC interLATA telemessaging services.[27]

Some of the BOCs raise another issue that surfaced in the BOC In-Region proceeding, namely, what makes a telemessaging service an interLATA service. U S West states that such a service is an interLATA one only where there is an interLATA transmission component "between the service provider and the end user" offered by the telemessaging service provider as an unbundled component of its service,[28] and Nynex adds that even where such an interLATA link is offered by the BOC's interLATA

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[26] See BellSouth Comments at 25-26.

[27] See 2A Sutherland, Statutory Construction § 46.06 (5th ed.). See n.6, supra.

[28] U S West Comments at 31-32.

affiliate, the BOC's telemessaging service is not an interLATA one if the interLATA link is offered separately from the telemessaging service.[29]

As MCI explained in its BOC In-Region Reply Comments, these positions require substantial modification to make them acceptable. U S West's statement is too narrow, because any interLATA transmission component of a telemessaging -- or any information -- service makes that service an interLATA one, not just interLATA links between the end user and the service provider. Thus, where the end user makes an intraLATA call that is intercepted by the BOC's call forwarding service at the end office serving the call recipient and forwarded to a BOC voice mailbox in another LATA, the BOC's service constitutes an interLATA telemessaging service, irrespective of the fact that the end user made an intraLATA call.[30]

As MCI also pointed out in its BOC In-Region Reply Comments, the view that the BOC affiliate's separate and independent provision of the interLATA transmission link to the BOC's telemessaging service does not make the latter an interLATA service is correct as far as it goes, but incomplete. MCI has no

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[29] Nynex Comments at 27-28.

[30] Reply Comments of MCI Telecommunications Corporation at 9-10, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149 (filed Aug. 30, 1996)(MCI BOC In-Region Reply Comments).

objection to such an interpretation as long as the interLATA transmission service satisfies the conditions set down in Section 271 and is subject to the separation and other requirements of Section 272. Thus, for example, the interLATA transmission could not be considered an "incidental interLATA service," since if the interLATA transmission were a truly stand-alone service, not connected or tied in any way to the affiliate's information service, it would not necessarily be used for the purposes listed in Section 271(g).

Moreover, the BOC's telemessaging service would have to be made available to users of other interexchange carriers' services at the same rates and on the same terms and conditions as it is to the BOC affiliate's interLATA telecommunications service customers, and the affiliate's interLATA telecommunications services, including the transmission links used to obtain access to the BOC's telemessaging service, would have to be made available to users of other telemessaging services at the same rates and on the same terms and conditions as it is to the BOC's own telemessaging service customers. Finally, since the separately purchased interLATA transmission link must be considered a stand-alone service, the BOC affiliate must have in-region authority under Section 271 in order to provide the interLATA link (at least for interLATA calls originating in the BOC's local service region).[31]

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[31] See MCI BOC In-Region Reply Comments at 10-11.

Some of the BOCs argue that the Computer III and CEI/ONA requirements should not continue to be applied to BOC telemessaging services. As discussed above, however, there is nothing in the Act to suggest that any of its provisions was intended to displace those pre-existing rules, and the BOCs advance no reasons for the sudden irrelevance of those rules, especially in light of the fact that intraLATA telemessaging services are not subject to the separate affiliate requirements of Section 272. Indeed, other BOCs freely admit that there is no reason not to apply those rules to telemessaging services, as long as they are applied to all ILECs equally.[32] Although the Computer III and CEI/ONA requirements are inadequate, they are the least that should be applied to BOC and other ILEC telemessaging services in order to implement the nondiscrimination requirements of Section 260, at least until final rules applicable to all information services (or at least all enhanced services) are established in the pending Computer III Further Remand Proceedings.

It bears repeating that the Computer III and CEI/ONA rules establish the minimum nondiscrimination standard that should be applied to BOC telemessaging services. As Voice-Tel points out, the inadequacy of those rules is such that Section 260 imposes a higher standard in certain respects. For example, Computer III only requires comparably efficient interconnection, while Section

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[32] See, e.g., Pacific Telesis Comments at 23-24.

260 demands absolute equality of interconnections for all other telemessaging providers with the BOC's local exchange network.[33] Accordingly, the Computer III and CEI/ONA rules establish only a minimum nondiscrimination standard that is superseded whenever absolute equality requires a higher standard.

CONCLUSION

For the reasons stated above and in MCI's initial comments, the Commission should adopt regulations implementing the non-accounting safeguards in Sections 260, 274 and 275 of the Act consistent with these comments.

Respectfully submitted,

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[33] See Voice-Tel Comments at 6.

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing "REPLY COMMENTS OF MCI TELECOMMUNICATION CORPORATION" was served this 20th day of September, 1996, by hand delivery or first class mail, postage prepaid, upon each of the following parties:

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